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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Idris Nawabi
2 P.41591/GF5-10L
3 Avenal State Prison
4 P.O. Box 9
5 Avenal, CA 93204-0009
6 Pro Se / Status

7 IN THE UNITED STATES DISTRICT COURT
8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 IDRIS NAWABI
11 Petitioner,
12 V.
13 J. HARTELY, Warden,
14 Respondent.

NO. C08-1258 WHA (PR)
PETITIONER OPPOSITION
TO RESPONDENT MOTION
TO DISMISS HABEAS CORPUS
PETITION AS UNTIMELY
AND PROCEDURALLY BARRED

15
16 The Petitioner hereby gives the Court no-
17 tice that he did, in fact received respondent's
18 motion to dismiss habeas corpus petition as un-
19 timely and procedurally barred (07-29-08). And
20 that the Petitioner hereby opposes/rejects res-
21 pondent's Motion to dismiss Petitioner's Habe-
22 as Corpus Petition as untimely and procedurally
23 barred. Petitioner's oppositions are made in wr-
24 ting (within) to preserve these oppositions for 'Ap-
25 peal' upon completion of this matter in District
26 Court.

27 (Attached within below are the following oppositions)

28 1.) Opposition to the Respondent's assertion

¹
opposition to Motion to Dismiss Habeas Corpus Petition as Untimely-
C 08-1258 WHA (PR).

1 that the Petition is untimely.

2 2.) Opposition to the Respondent's assertion that
3 the Petition is procedurally barred.

4 ARGUMENT I. :

5 A. The Respondent contends that the Petition
6 is untimely and that running of the limitation
7 period in this case is governed by USC § 2244(d)(1)(A)
8 is patently unreasonable and does not apply
9 within for the below listed reasons.

10
11 1. Under 28 USC § 2254(d)(1)(C), which specifies that
12 the statute of limitations shall run from "the
13 date on which the constitutional right asserted
14 was initially recognized by the Supreme Court,
15 if the right has been newly recognized by the
16 Supreme Court and made retroactively applicable
17 to cases on collateral review..." see *Cunningham*
18 *v. California*, 127 S.Ct. 856, 871 (2007) which the
19 Court found that imposition of an upper-term
20 sentence based on facts not tried to a jury
21 violates the Sixth Amendment of the United
22 States Constitution. Accordingly, petition for
23 writ of habeas Corpus is timely.

24 ARGUMENT II. :

25 B. Application of *Apprendi*, *Blakely*, or *Cunningham*
26 to Petitioner's case would not violate the
27 rule of *Teague v. Lane*, 489 U.S. 288 (1989) which
28 as the court would agree that is simply a false as-

1 sertation on the Respondent's part because that would
 2 make all cases (even petitioner's case) fall under the
 3 erroneous, ambiguous and patently unreasonable,
 4 and would fall under the Ex Post Facto Laws. Fed-
 5 eral habeas relief is not barred in this matter
 6 for the following stated reasons.

7 Application of Apprendi, Blakely, or Cunningham
 8 to petitioner's case would not violate the rule of
 9 Teague v. Lane, 489 U.S. 288 (1989). In that case,
 10 the Supreme Court held that a new rule of Con-
 11 stitutional law cannot be applied retroactively on
 12 federal collateral review, unless the new rule
 13 forbids criminal punishment of individual conduct
 14 or is a "watershed" rule of criminal procedure.
 15 Petitioner hereby contends that the rule announced
 16 in Cunningham is a "watershed" rule of criminal
 17 procedure which held that California Determinate
 18 Sentencing Law (D.S.L) is unconstitutional, by
 19 placing sentence elevating fact-finding within the
 20 Judge's province, violates a defendant's right to
 21 trial by Jury safeguarded by the Sixth and Four-
 22 teenth Amendments to find aggravating factors
 23 to be true beyond reasonable doubt, not merely
 24 by a preponderance of the evidence. Cunningham
 25 announced that jurors, not judges are allowed
 26 to impose an upper-term sentence. See Cunningham
 27 v. California, 549 U.S. 270 [127 S. Ct. 856] (2007).
 28 Accordingly, Petitioner is not barred procedurally.

1 Therefore, in light of the Constitutional right
2 newly recognized and announced by U.S. Supreme Court
3 in *Cunningham v. California*, 549 U.S. 270 [127 S. Ct.
4 856] (2007) (January 22), petitioner did file a timely
5 petition for writ of habeas corpus on January 31, 2007,
6 in the Superior Court of California, County of Alameda,
7 the Court denied petitioner's habeas corpus petition
8 (03-28-07).

9 On April 26, 2007, petitioner filed a petition
10 for writ of habeas corpus in the California Court
11 of Appeal. The Court of Appeal denied the Petition
12 (05-10-07).

13 On July 30, 2007, petitioner filed a petition
14 for writ of habeas corpus in the California Supreme
15 Court. The California Supreme Court denied the Petition
16 for writ of habeas corpus (01-16-08).

17 On March 04, 2008, petitioner filed this petition
18 before this District Court (Northern District), raising
19 this Constitutional right that was asserted
20 in *Cunningham*, *Blakely*, or *Apprendi* and recognized
21 by the U.S. Supreme Court which found that the
22 imposition of an upper-term sentence by the Judge,
23 absent a jury finding, violates a criminal defendant's
24 Sixth and Fourteenth Amendment right. Accordingly,
25 because the rule of *Apprendi*, *Blakely*, or *Cunningham*
26 rule is newly recognized and clearly established, it
27 should be applied to petitioner's case since this newly
28 recognized rule is a "watershed" rule of criminal procedure.

CONCLUSION

For the reasons stated, Respondent's Motion to Dismiss Petitioner's Habeas Corpus Petition as untimely and procedurally barred shall be denied. Petitioner respectfully requests that the petition for writ of habeas corpus be granted federal collateral review for federal habeas relief.

Dated: August 05, 2008

Respectfully submitted

Idris Nawabi

Idris Nawabi/Petitioner

PROOF OF SERVICE BY MAIL

Case Name 8 Nawabi v. Hartely, Warden

No. C 08-1258 WHA (PR)

I THE UNDERSIGNED, CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE. THAT I

CAUSED TO BE SERVED A COPY OF THE FOLLOWING DOCUMENT:

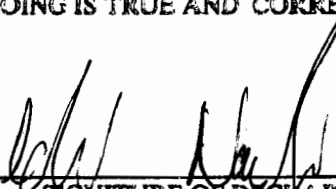
ENTITLED: Opposition to Respondent's Motion
to Dismiss Habeas Corpus Petition as
Untimely and procedurally barred

BY PLACING THE SAME IN AN ENVELOPE, SEALING IT BEFORE A CORRECTIONAL OFFICER,
AND DEPOSITING IT IN THE [UNITED STATES MAIL] AT AVENAL STATE PRISON AND ADDRESSED IT
TO THE FOLLOWING:

U.S. District Court,
Northern District of California
Attn: Office of the Clerk
450 Golden Gate Avenue
San Francisco, CA 94102

EXECUTED ON August, 05, 2008 AT AVENAL STATE PRISON, AVENAL CALIFORNIA

I, Idris Nawabi DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAW
OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.


SIGNATURE OF DECLARANT

Idris Nawabi/Petitioner
PRINT NAME OF DECLARANT

PRO PER.

1 drs Navaho, #P.41591
Avenal state Prison
P.O. Box 9/Gym-5/101
Avenal, CA 93204-0009

AVENAL STATE PRISON

RECEIVED

AUG 11 2010

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIF.

LEGAL MAIL

AUG 06 2008

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MAY 1904

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Attn: Office of the Clerk
450 Golden Gate Avenue
San Francisco, CA 94102



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